IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 9537 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HIRABEN J. VYAS

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 9537 of 2001

MR DC SEJPAL for Petitioners No. 1-2

Mr V M Pancholi, APP for Respondent No. 1

MR JAYANTI K THORIA for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 27/03/2002

ORAL JUDGEMENT

The petitioners herein have preferred this

petition under section 482 of the Code of Criminal Procedure, 1973 for quashing a private complaint being C.C. No.163/2001 filed by respondent no.2 herein against the petitioners and 43 other accused persons for offences punishable under section 406 of IPC, in the alternative for the offence punishable under section 420 of IPC read with section 120-B of IPC. The said complaint was filed on 31.5.2001. The petitioners herein have applied for quashing of the said complaint.

2. It is the contention of the present petitioners that before filing the aforesaid complaint on 31.5.2001 being Criminal Complaint no.163/2001 placed at Annexure 'A' at page 1 to the application, the contesting respondent had filed enquiry case No.6/2001 before the said Court against the petitioners and 36 other accused persons for the said offences on 31.1.2001. It seems that the learned Magistrate recorded verification of the original complaint on oath and thereafter, the learned Magistrate was pleased to pass an order for enquiry in to the matter under section 202 of the Code. It appears from the said complaint that on 2.5.2001, the original complainant made an endorsement below the said complaint "not press". However, records show that the learned Magistrate did not pass any order on the said complaint on 2.5.2001. At the same time, the original complainant submitted application Exh.5 dated 27.11.2001 stating that in fact the said complaint was not pressed on 2.5.2001 but the complainant desires to withdraw the said complaint. On the basis of the said application, the learned Magistrate appears to have passed an order for disposal of the said complaint being Criminal Case No.6/2001 on 27.11.2001. In the meantime, the original complainant filed another criminal complaint being criminal complaint no.163/2001. The complainant is the same, the accused persons are also the same and the facts stated in both the complaints are also the same. The said complaint was filed on 31.5.2001. The learned Magistrate has passed an order dated 31.5.2001 that the matter be referred for investigation to the concerned police station under section 156(3) of the Code. Feeling aggrieved by the said order of the learned Magistrate, the petitioners herein have preferred this petition for quashing the said complaint and the order of the learned Magistrate under section 482 of the said Code.

3. Notice was issued at the first instance and Rule was issued thereafter. In response to the service of rule, Mr V M Pancholi, learned APP appears for respondent no.1-State of Gujarat whereas Mr J K Thoria, learned Advocate appears for respondent No.2, who happens to be

the original complainant in both the matters. I have heard both the learned Advocates for the parties and have perused the papers. Learned advocate for the original complainant has heavily relied upon the provisions in the Code stating that when some irregularities have been committed, such irregularities would not vitiate the trial and, therefore, the trial should proceed ahead. Here it is not a case of a procedural defect or irregularity. The point is that the original complainant had already filed a complaint being Enquiry No.6/2001. The said complaint was pending and yet another complaint on the same set of facts was filed by the original complainant being C.C. No.163/2001 before the said Court. Learned Advocate for the petitioners has argued that in the previous complaint, the order was passed for enquiry under Section 202 of the Code. That the original complainant was not satisfied by the said order and, therefore, he suppressed the said fact and filed another complaint being C.C. No.163/2001 before the said Court. When the learned Magistrate who had dealt with the previous complaint was on leave and the charge was with another Magistrate of the said Court. It is pertinent to note that the second complaint dated 31.5.2001 does not disclose that the complainant had filed previous complaint and it was pending before the Court. Learned Advocate for the contesting respondent and the original complainant has also submitted that when the endorsement was made on 2.5.2001 to the effect that the original complainant did not press the complaint, it was the duty of the Magistrate to pass an order of disposal of the said complaint. It is difficult to agree with the said contention of the learned Advocate for the original complainant. It is required to be considered that the offences alleged in the two complaints are warrant triable offence and there, the provisions made in Chapter 19 of the said Code do not provide for withdrawal of such cases. In other words, warrant triable private complaints cannot be withdrawn in accordance with the provisions made in the Code. Therefore, the learned Magistrate cannot be said to have committed any fault in not passing any order on the date on which the endorsement as aforesaid was made by the respondent no.2. However, on 27.11.2001, a separate application was filed by the original complainant and on account of the said application, the first complaint was treated as disposed of on 27.11.2001. But the fact remains that when the second complaint was made on 31.5.2001 on that date the first complaint was alive and it was not disposed of. This means that when the second complaint was filed, the first was pending and the pendency of the complaint was not indicated in the second complaint. There is

therefore, material defect on the part of the original complainant in not stating the said fact in the second complaint. It is more so, when the first complaint was pending for enquiry before the Court and the original complainant could have waited for the conclusion of the said enquiry. At the close of the enquiry either the Magistrate would have issued process against the accused person or he would have dismissed the complaint under section 203 of the code but without waiting for any proceeding in the matter, the original complainant preferred a second complaint on 31.5.2001. In my opinion, when the first complaint was pending, the second complaint was impermissible when both the complaint related to the same accusations and same facts.

4. Learned APP Mr V M Pancholi has referred to a decision in the case of T T Anthony v. State of Kerala, reported in AIR 2001 SC 2637 and submitted that when a first complaint is pending second complaint on the same set of facts is not maintainable. Even otherwise, when the first complaint was pending and it was not disposed of, it was not open to the original complainant to file a second complaint on the same set of facts. Moreover, as said above, the original complainant did not disclose in the second complaint that the first complaint was filed on the same set of facts and it was pending. Even if there was an impression of the complainant that the Court must have disposed of the first complaint, that fact could have stated in the second complaint that he had filed similar complaint in the past and it was posted for enquiry under section 202 of the Code and the complainant had not pressed the said complaint. These facts were required to be indicated in the second complaint to enable the Court concerned to take an appropriate view while dealing with the second complaint.

5. As said above, this is not a mere irregularity which can be overlooked and which would not vitiate the proceedings in question. Here it is a clear case of illegality inasmuch as the second complaint was filed without mentioning about the pendency of the first complaint with a view to obtain an order for police investigation under section 156(3) of the Code. Another decision cited by the learned Advocate for the original complainant reported in AIR 1971 SC 1925 shows that when procedural irregularities have been committed, they would not vitiate the proceedings. This decision will not apply to the facts of the case before us. Similar is the case reported in 1998 Cr.L.J. 598. It also shows that irregularities would not vitiate the trial. The said question would not arise because the trial has not

commenced and even otherwise, there is no question of irregularity committed in the matter here. It is a clear case of illegality committed by the original complainant in filing second complaint when the first one was pending. In these circumstances, I am of the opinion that when the second complaint was filed, the first complaint was pending and it was not disposed of. Moreover, the first complaint could not have been withdrawn by the complainant in view of the provisions made in the Criminal Procedure Code. It is more so, when the first complaint related to warrant triable offence and such a case could not have been permitted to be withdrawn by the Court also. In that view of the matter, when first complaint was pending, second complaint could not have been filed and, therefore, the second complaint is required to be quashed.

6. For the foregoing reasons, I am of the opinion that the second complaint is nothing but an abuse of process of court and power of the Court and, therefore, it is required to be quashed. For the foregoing reasons, this application is allowed. The second complaint being C.C. No.163/2001 pending before the learned Judicial Magistrate First Class, Mahuva under which the investigation has been ordered under section 156 (3) of the Code is hereby ordered to be quashed qua the present petitioners.

Rule is made absolute to the aforesaid extent.

27.3.2002 [D P Buch, J.]
msp